3-21-2016

Hoggman v. The Board of the Local Improvement District No. 1101 Respondent's Brief Dckt. 43295

IN THE SUPREME COURT OF THE STATE OF IDAHO

JEANETTE HOFFMAN, DON THOMAS, MARI THOMAS, BRIAN NELSON, LOUISE LUSTER, LYNDA SNODGRASS, LANCE HALE, MONIQUE HALE, ROXANNE METZ, AL THORNTON, TONI THORNTON, BLAIR HAGERMAN, DARRIN HENDRICKS, LESLIE CURFMAN, MIKE ZEHNER, JOSE FRANCA, KAREN CROSBY, CHUCK BOYER, and KIM BLOUGH, individuals,

Plaintiffs-Appellants,

vs.

THE BOARD OF THE LOCAL IMPROVEMENT DISTRICT NO. 1101, an Idaho Local Improvement District; BOARD OF ADA COUNTY COMMISSIONERS,

Defendants-Respondents.

Supreme Court Docket No. 43295

Consolidated Cases:

Supreme Court Docket No. 43295-2015
Ada County No. CV-2013-16705

Supreme Court Docket No. 43628-2015
Ada County No. CV-2013-16705

RESPONDENTS' BRIEF

Appeal from the District Court of the
Fourth Judicial District for Ada County

Honorable Timothy Hansen, District Judge, Presiding

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I.

STATEMENT OF THE CASE

A. Introduction[1]

This appeal stems from the above-named Appellants' challenge to the creation of Ada County Local Improvement District No. 1101, commonly known as Sage Acres Local Improvement District ("Sage Acres LID" or "the LID"), and the resulting assessment levied on properties within the LID by Respondents Board of the Local Improvement District No. 1101 and Board of Ada County Commissioners (collectively "Respondents"). The purpose of the LID was to construct a water delivery system for residential and irrigation use by properties within Sage Acres Subdivision ("Sage Acres"), a neighborhood located off of Old Horseshoe Bend Road in Boise, Idaho. Appellants first appealed to the Fourth Judicial District Court, Ada County, on September 18, 2013, when they filed a Notice of Appeal from Assessments ("Notice"), raising a laundry list of challenges to the creation and confirmation of an assessment roll for Sage Acres LID. From that point forward, Appellants forced Respondents to defend this case based solely on those bare allegations.

In December 2014, Respondents filed a motion for summary judgment ("Respondents' MSJ") based on the absence of any legal or factual support for Appellants' claims. While that motion was pending hearing, the parties engaged in a meditation before Judge D. Duff McKee on December 22, 2014. At the end of the mediation, Judge McKee requested that the Parties sign an untitled, handwritten document, with *some* of the terms of a potential settlement

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[1] Citation to the record is not included in this section for the sake of brevity and clarity. A more detailed procedural and factual recitation including citation to the record follows.

agreement ("Mediation Terms Sheet"). Thereafter, counsel for the Appellants and Respondents exchanged draft settlement agreements but were not able to reach final settlement.

Rather than substantively respond to Respondents' MSJ on file, Appellants filed Appellants' Motion to Dismiss Appeal with Prejudice ("Motion to Dismiss"), which requested that the Court enforce the Mediation Terms Sheet and dismiss the appeal pursuant to its terms. At the initial January 27, 2015 hearing set for Respondents' MSJ, the District Court allowed Appellants additional time to respond to Respondents' MSJ and instructed Appellants to re-file their Motion to Dismiss as a cross-motion for summary judgment. Thereafter, Appellants filed their Motion for Summary Judgment to Enforce Settlement Agreement ("Appellants' MSJ") and a Notice of Non-Opposition to Respondents' Motion for Summary Judgment ("Non-Opposition"), and a hearing on both summary judgment motions was held on March 12, 2015. At the hearing, Appellants' counsel reiterated to the District Court multiple times that—per their Non-Opposition—if the Court denied Appellants' MSJ, the Court should grant Respondents' MSJ and dismiss the appeal.

In a Memorandum Decision and Order dated March 30, 2015, the District Court denied Appellants' MSJ, and—pursuant to Appellants' counsel's instructions at the hearing—granted Respondents' MSJ and dismissed the appeal. Final judgment was entered on April 14, 2015, and Appellants timely filed this appeal. Following briefing and argument, the District Court also awarded Respondents reasonable attorney fees and costs under Idaho Code §§ 12-117(1) and 12-121 on the basis that Appellants' appeal to the District Court was brought and pursued without a reasonable basis in fact or law.

In this consolidated appeal, Appellants have raised only two narrow substantive issues directed to the District Court's denial of Appellants' MSJ—that the District Court: (1) was required to make a finding that the Mediation Terms Sheet was ambiguous as a prerequisite to considering whether there was a meeting of the minds regarding settlement; and (2) improperly considered immaterial and inadmissible hearsay in declining to enforce the Mediation Terms Sheet on summary judgment. As discussed below, these issues were waived at the District Court level, are unsupported by argument and authority on appeal, and/or are legally baseless. Importantly, Appellants have raised no issue whatsoever regarding the District Court's *grant* of Respondents' MSJ in their opening brief. Thus, that ruling is outside the purview of this Court's review.

As to the District Court's award of attorney fees, Appellants raise the additional issues that: (1) fees were not awardable by the District Court under Idaho Code §§ 12-121 and 12-117(1) in light of language in Idaho Rule of Civil Procedure 3(a) and Idaho Code §§ 50-1718; and (2) Appellants' appeal to the District Court was legally and factually supported. As discussed below, these issues have also been waived at the District Court level, are unsupported by argument and authority on appeal, and/or are baseless.

B. Course of Proceedings[2]

It is important for this Court to understand the overall procedural history of this appeal, as it highlights the frivolity with which it has been brought and pursued by Appellants from the

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2 For convenience of the Court, all references to the Clerk's Record prepared for Supreme Court Docket No. 43295-2015 will use the designation "R" and all references to the Limited Clerk's Record prepared for Supreme Court Docket No. 43628-2015 will use the designation "LR."

start. Since the filing of their Notice in the District Court, Appellants neither served on Respondents nor offered into the record any legal argument or admissible evidentiary support regarding their substantive challenges on appeal, despite being given multiple opportunities to do so. Even if they had, they had no legally cognizable grounds for appeal under Idaho's Local Improvement District Code ("Idaho's LID Code"). Yet Appellants' bare-minimum litigation tactics still required Respondents to defend against the appeal, thereby incurring significant fees and costs.

Appellants have consistently filed late pleadings in this case, and the District Court has graciously excused their conduct each time. Although the agency record and transcripts in this case were lodged with the LID Board on October 22, 2013, giving the parties 14 days in which to object to their contents, Appellants waited until November 12, 2013—the 15th day—to file their objections. *See* 12/6/13 Order Settling Record, R000064. Likewise, although the settled record and transcript were filed with the Court on December 6, 2013, giving the parties another 21 days to move to augment, Appellants again filed an untimely motion to augment on December 30, 2013—three days late. Again, Respondents were required to respond to this untimely pleading and engage in a hearing. 3/7/14 Memorandum Decision and Order, p. 2, R000115.

On September 11, 2014, Appellants served on Respondents an expert disclosure that wholly failed to comply with the requirements of Idaho Rule of Civil Procedure 26(b)(4)(A)(1)(i). Declaration of Lynnette M. Davis in Support of Motion for Attorney Fees and Costs and Memorandum of Attorney Fees and Costs ("Davis F&C Dec.") at ¶ 2, Ex. A, LR000028, 000036-40. The disclosure attached a 1.25-page letter dated September 10, 2014,

from Appellants' expert, Jerry T. Elliott, P.E., which referred to and attached an earlier 1.5-page letter dated July 2013. *Id.* Although Mr. Elliott was purportedly retained to testify regarding the design, construction, and performance of the LID-funded water delivery system, the letters failed to express a single affirmative opinion on that subject, as required by Rule 26(b)(4)(A)(1)(i). *Id.* Instead, the letters were nonsensical, relied on no admissible evidence, and merely concluded that "an independent professional, distinct from the water district and the engineering company, should have access to the final installed facilities and that the pumps and delivery system be documented that they do meet the needs of Sage Acres." *Id.* In other words, the letter conceded that Mr. Elliott had performed no examination of the system whatsoever and, thus, could not offer any opinion about its design, construction, or performance.

Notwithstanding Appellants' wholly deficient disclosure, Respondents were required to—and did, in fact—retain an engineering expert, Cathy Cooper, P.E., to (1) opine regarding the design and construction of the water delivery system, the cost to construct the system, and the adequacy of the design and the performance of the constructed system; and (2) rebut Appellants' "expert report," such as it was. Davis F&C Dec. at ¶ 4, LR000028-29. In compliance with the August 8, 2014 Order Governing Proceedings and Setting Trial in place at the time, Respondents disclosed Ms. Cooper's detailed expert report on October 17, 2014, and Ms. Cooper's detailed rebuttal report on November 7, 2014. *Id.* at ¶ 5, Exs. B and C, LR000041-68. The substance of those reports was wholly incorporated into the Declaration of Cathy Cooper, P.E., filed in support of Respondents' MSJ. Declaration of Cathy Cooper, P.E., R000194-201.

Additionally, Appellants failed to respond to Respondents' duly served discovery requests. On December 2, 2014, Respondents' counsel served Appellants' counsel with Respondents' First Set of Requests for Admission to Appellants and Respondents' First Set of Interrogatories and Requests for Production to Appellants. Davis F&C Dec. at ¶¶ 6-7, Exs. D and E, LR000029, 000069-000107.[3] On December 3, 2014, Respondents' counsel filed and served a Notice of Service of Respondents' First Set of Interrogatories and Requests for Production to Appellants and Respondents' First Set of Requests for Admission to Appellants. *Id.* at ¶ 8, Ex. F, LR000029, 000108-111. These requests contained detailed contention interrogatories, requests for production, and requests for admission regarding each of the challenges raised in Appellants' Notice. *Id.* at Exs. D and E, LR000069-107. Appellants never responded to those requests. *Id.* at ¶ 9, LR000029.[4]

In similar fashion, Appellants failed to file *any* substantive response to Respondents' MSJ, despite being given multiple opportunities to do so. On December 11, 2014, Respondents filed Respondents' MSJ and supporting materials, all demonstrating that there was no material question of fact as to any of Appellants' challenges on appeal and that Respondents were entitled, as a matter of law, to the dismissal of the appeal with prejudice. *See* R000126-381. More specifically, Respondents' submitted argument and supporting evidence that the challenges

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[3] Appellants failed to propound any discovery requests on Respondents. Davis F&C Dec. at ¶ 9, LR000029.

[4] Throughout post-mediation negotiations between counsel regarding a potential settlement agreement and release, Respondents' counsel repeatedly advised Appellants' counsel that absent a signed settlement agreement and release Respondents expected to proceed in all aspects of litigation, including written discovery and Respondents' MSJ. Davis F&C Dec. at ¶¶ 12–17, Exs. H–J, LR000030-31, 000114-123.

raised in Appellants' Notice were statutorily time-barred, legally irrelevant under Idaho's LID Code, and devoid of any evidentiary support. *Id.* Respondents also presented voluminous affirmative evidence demonstrating as a matter of law that: Sage Acres LID was duly formed by Ada County Ordinance No. 780 ("Formation Ordinance"); the water delivery system to be funded by the LID was designed and constructed in a cost-effective and workmanlike manner in compliance with all applicable laws and regulations; and the LID assessment roll was duly confirmed by Ada County Ordinance No. 809 ("Assessment Ordinance"). *Id.*

On December 15, 2014, the Court issued a Notice of Hearing on Summary Judgment and Scheduling Order. *See* R000382. Pursuant to that Order, the Court scheduled Respondents' MSJ for hearing on January 27, 2015. *Id.* Appellants were ordered to file their "opposing affidavits and answering briefs within fourteen (14) [days] prior to the hearing." *Id.* Thus, Appellants' opposition to Respondents' MSJ was due no later than January 13, 2015.

Appellants failed to file any opposing affidavits or answering briefs to Respondents' MSJ by the January 13, 2015 due date, despite the fact that Respondents' counsel had repeatedly advised Appellants' counsel that Respondents would be moving forward with their motion in the absence of a signed settlement agreement and release. *See* Davis F&C Dec. at ¶¶ 12–17, Exs. H–J, LR000030-31, 000114-123. Instead, Appellants filed their Motion to Dismiss, which requested that the Court enforce the Mediation Terms Sheet signed at the parties' mediation on December 22, 2014. R000389-404. This pleading contained no argument or evidence regarding Appellants' substantive challenges on appeal. *Id.*

On January 27, 2015, the parties appeared before the Court on Respondents' MSJ and on Appellants' so-called "Motion to Dismiss." *See generally* January 27, 2015 Hearing Transcript. At that hearing, the Court held that Appellants' "Motion to Dismiss" was actually a motion seeking to enforce a settlement agreement and, therefore, should have been filed as a Motion for Summary Judgment. *Id.* at 17-18. Despite the fact that the deadline for filing motions for summary judgment had long since lapsed, the Court agreed to grant Appellants leave to re-file their motion seeking enforcement of the purported settlement agreement as a Motion for Summary Judgment. *Id.* at 12-15.

The Court also granted the Appellants *additional* time to respond to Respondents' MSJ, as Appellants had missed their first response deadline. The Court ordered the following:

> February 17, 2015 - Due Date for Appellants' Motion for Summary Judgment to Enforce Settlement Agreement;
>
> March 3, 2015 - Due Date for Respondents to Respond to Appellants' Motion for Summary Judgment to Enforce Settlement Agreement; and Due Date for Appellants to Respond to Respondents' MSJ (originally filed on December 11, 2014);
>
> March 10, 2015 - Due Date for Appellants' Reply in Further Support of Motion for Summary Judgment; Due Date for Respondents' Reply in Further Support of Respondents' MSJ;
>
> March 12, 2015 - Hearing Before this Court on Both Motions for Summary Judgment.

Id. at 23-41. As a result of this new briefing schedule, the trial was postponed from March 9, 2015, to April 13, 2015. *Id.*

On February 17, 2015, Appellants filed Appellants' MSJ, again offering no argument or evidence relating to Appellants' substantive challenges on appeal but solely seeking to enforce

the Mediation Terms Sheet. R000426. On March 3, 2015, Respondents filed their Opposition to Appellants' Motion to Enforce Settlement Agreement and related evidentiary and supporting materials. R000495-585. On March 3, 2015, Appellants *again* failed to file any opposition to Respondents' MSJ as ordered by the Court at the January 27, 2015 hearing. On March 5, 2015, Respondents filed their Reply in Further Support of Motion for Summary Judgment, again asking the Court for judgment as a matter of law due to the complete dearth of legal or evidentiary support for Appellants' challenges. R000586-591. On March 11, 2015—a day before the March 12, 2015 hearing—Appellants filed their Non-Opposition. R000592-594. The Non-Opposition stated:

> The Appellants hereby notify the Court and opposing counsel that, consistent with the Appellants' contention that this matter settled at mediation on December 22, 2014, and in furtherance of their desire to not incur the significant expenses associated with a trial on this matter, they do not oppose Respondent's request that this appeal be dismissed.
>
> Appellants decision to decline to oppose the Respondent's request for dismissal does not, however, have any bearing on the reasonableness of the legal or factual grounds for the appeal itself, and Appellants will outline those grounds in the event that their own motion for summary judgment is not granted and/or if Respondent moves for an award of attorney's fees or costs beyond the costs specifically allowed by I.C. § 50-1718.

R000592-593.

While the Non-Opposition *appeared* to attempt to reserve a right to respond to Respondents' MSJ should Appellants' MSJ be denied, Appellants' counsel clarified Appellants' position at the March 12, 2015 hearing on the parties' motions. After a long colloquy with the Court regarding the intended effect of Appellants' Non-Opposition, Appellants' counsel

unambiguously announced to the Court that Appellants waived any objection to Respondents' MSJ:

> THE COURT: Okay. Now, in this case, Mr. Schoppe, just so I am clear then, is what you are saying is that if I deny your motion for summary judgment, then your nonopposition to the respondents' motion would be in effect and I could still dismiss the appeal even though I had denied your motion for summary judgment; is that what you are saying?
>
> MR. SCHOPPE: Yes, Your Honor. That is consistent with what I had—how I had envisioned this playing out today.
>
> THE COURT: Okay. So—and counsel, just so we are all clear on this, my understanding is that today we would be arguing the appellants' motion for summary judgment to enforce a settlement agreement. The Court would rule on that motion, candidly, it would probably take a written opinion, but in this situation would rule on that motion.
>
> If the Court grants the summary judgment motion, effectively that would grant to the appellants the relief they have requested and would just enforce the settlement agreement. But if the Court denies the summary judgment motion in that situation, then as I understand it, the nonopposition to the respondents' motion is in effect and therefore, the Court could summarily grant that motion and dismiss the appeal. Am I stating the—your positions correctly?
>
> MR. SCHOPPE: Precisely, Your Honor. Thank you.

March 12, 2015 Hearing Transcript ("3/12/15 Tr."), 53:11-54:16. Appellants' counsel *only* reserved a right to oppose an award of attorney fees and costs upon grant of Respondents' MSJ. *Id.* at 46:20-21.

At the March 12, 2015 hearing, the Court allowed Appellants *yet another* opportunity to submit briefing in response to Respondents' Motion for Summary Judgment, which had been on file for three months at that time. *Id.* at 88-89. Counsel for Appellants advised that such briefing would not be forthcoming. *Id.* Following the March 12, 2015 hearing on the parties' motions,

the Court entered its Memorandum Decision, denying Appellants' motion and—per Appellants' instructions at the March 12 hearing—granting summary judgment in favor of Respondents. R000595-602.

Final judgment was entered on April 14, 2015, and Appellants timely filed this appeal. R000603-612. Following briefing and argument, the District Court also awarded Respondents reasonable attorney fees and costs under Idaho Code §§ 12-117(1) and 12-121 on the basis that Appellants' appeal to the District Court was brought and pursued without reasonable basis in fact or law. 4/14/15 Memorandum Decision and Order, LR000173-178. In a separate appeal, Idaho Supreme Court Case No. 43628, Appellants challenged the judgment for fees and costs. The two appeals have since been consolidated.

C. The December 22, 2014 Mediation

As noted above, Appellants' appeal of the District Court's decision on the cross-motions for summary judgment is based solely on the District Court's denial of Appellants' MSJ—not on the grant of Respondents' MSJ. More specifically, Appellants take issue with the District Court's refusal to enforce the Mediation Terms Sheet on summary judgment. As Appellants state in their briefing on appeal, the parties submitted to mediation before the Honorable Judge D. Duff McKee on December 22, 2014. At the end of the mediation, Judge McKee requested that the parties sign an untitled, hand-written document, with *some* of the terms of a potential settlement agreement—the Mediation Terms Sheet. Declaration of Lynnette M. Davis in Opposition to Appellants' Motion for Summary Judgment to Enforce Settlement Agreement ("Davis Opposition Dec."), at Ex. A, R000525.

Contrary to Appellants' factual assertions, the record shows that: (1) all material terms were *not* included on the Mediation Terms Sheet; (2) a full release of all claims *was* a material term of a potential settlement between the parties; (3) the parties intended to further reduce the terms of a settlement to a more formal writing, including a full release of Appellants' claims, beyond the slapdash Mediation Terms Sheet; and (4) there was never a "meeting of the minds" as to all material terms of a settlement agreement. *See generally* Respondents' Opposition to Appellants' Motion for Summary Judgment and Enforcement of Settlement Agreement ("Respondents' Opposition"), R000495.

Numerous facts indicate that Appellants' agreement to execute a broad and inclusive release of all claims was a material term to a settlement agreement. Affidavit of Ted Argyle ("Argyle Aff.") at ¶ 7, R000515. Indeed, contrary to the implications of Appellants, Appellants' Notice of Appeal from Assessments contains broad allegations and claims expressly relating to the conduct of the "LID, Ada County, Eagle Water Company, [and] other parties involved in the construction and/or in the operation, now or in the future, of the water system which is the focal point of the LID." *See e.g.* Notice of Appeal from Assessments at ¶ 35(i), R000014. Accordingly, it should have been no surprise that Respondents considered Appellants' release of such claims to be a necessary and material term to any potential settlement agreement. Argyle Aff. at ¶ 5, R000514.

In fact, Respondents believed that the substantive terms of a potential settlement, as conveyed by Judge McKee, by the end of the mediation were as follows: (1) Respondents would agree to forgo their claim against Appellants for litigation costs and attorneys' fees; (2)

Appellants would pay all outstanding amounts due under Assessment Ordinance, within a specified time period; (3) Appellants would execute a full release of all claims in any way related to the allegations or claims made in their Notice of Appeal from Assessments, releasing Respondents, including a release of all claims that could be brought against them for the acts of their agents; and (4) the parties would stipulate to dismiss Appellants' Notice of Appeal from Assessments with prejudice, with the parties paying their respective fees and costs. *Id.* at ¶ 6, R000515. It was only pursuant to these terms that Respondents would agree to settle the case, and Respondents understood from Judge McKee that Appellants were amenable to these terms. *Id.* at ¶ 7, R000515. Moreover, Respondents considered each of these terms material to a settlement agreement and that all of them were essential for a full and final settlement agreement to be reached. *Id.* at ¶ 8, R000515.

The fact that the parties specifically discussed a formal settlement agreement and release immediately following the mediation and proceeded to negotiate and exchange several drafts of an "Unconditional Settlement Agreement" over the period of several weeks after the mediation belies the Appellants' position that there was an enforceable settlement agreement entered on December 22, 2014. At the conclusion of the mediation, Respondents' counsel advised Appellants' counsel that (a) she would forward a proposed settlement agreement and release as soon as possible; and (b) the Ada County Commissioners would put the approval of the settlement agreement and release on the agenda of their December 30, 2014 meeting. Davis Opposition Dec., ¶ 3, R000520. At no time did Appellants' counsel state or indicate in any way

that he did not believe a release was required under the terms discussed by the parties or that the Mediation Terms Sheet constituted the final and enforceable settlement agreement. *Id.*

Further, on December 29, 2014, Respondents' counsel sent Appellants' counsel an e-mail with the subject line, "Proposed Settlement Agreement." Davis Opposition Dec. at Ex. B, R000526. Attached to the e-mail was a .pdf file of a "Proposed Settlement Agreement." *Id.* at Exs. B, C, R000526-534. In the body of the email, Respondents' counsel noted that the Respondents "have this [i.e., the proposed settlement agreement] on the agenda for their meeting tomorrow morning [December 30, 2014] at 10:00 a.m." *Id.* at Ex. B, R000526. The attached draft settlement agreement was expressly captioned as an "Unconditional Settlement Agreement." *Id.* at Ex. C, R000527. On the same day, December 29, 2014, Respondents' counsel sent a revised draft of the proposed settlement agreement which attached a draft with a revised signature block for the Respondents. *Id.* at Exs. D, E, R000535-543. Respondents' counsel requested that Appellants' counsel respond by 8 a.m. on December 30, 2014. *Id.* at Ex. D, R000535.

On the morning of December 30, 2014, Appellants' counsel responded and noted that he would not be able to "meet that timeframe," but that he would "try to get this [i.e., an approved and executed settlement agreement] back to you by tomorrow[.]" *Id.* at Ex. F, R000544. That same day, Respondents' counsel responded and asked, "I realize that you will want to talk with your clients, but is there anything that you are concerned about in the agreement?" *Id.* at Ex. G, R000546. Shortly thereafter, Appellants' counsel responded, stating "I've only just barely looked at it myself, so I can't say one way or the other, sorry." *Id.* at Ex. H, R000549. Of

course, Appellants' counsel's final e-mail begs the question: if the Mediation Terms Sheet was a full and final settlement agreement (as the Appellants now contend), why would it be necessary for the Appellants' counsel to review and approve the proposed settlement agreement? In other words, why didn't Appellants' counsel assert then and there that the Mediation Terms Sheet was a binding settlement contract and that the "Proposed Settlement Agreement" was merely superfluous? Moreover, why didn't Appellants' raise any objection to Respondents' counsel's suggestion of a formal settlement and release at the conclusion of the mediation? *See* Davis Opposition Dec., ¶ 3, R000520.

Regardless, on January 5, 2015, Appellants' counsel responded with an e-mail to Respondents' counsel entitled, "Sage Acres - Review of Draft Settlement Agreement," attaching a redlined draft of the Proposed Settlement Agreement, and which stated in the body of the e-mail as follows:

> Good afternoon Lynnette:
>
> I've now heard back from my clients, and I've interlineated our proposed changes in the attached pdf.
>
> To briefly summarize, there is a dispute as to whether the Sage Acres HOA Board was properly constituted to take any action at any relevant time, and there remain issues as to whether the petition procedures were followed at the time, so I think it's best to simply start with the fact that the LID was formed, period.
>
> Further, my clients want it made very clear that the settlement releases no potential claims against Eagle Water Company, Moore Smith Buxton & Turcke, and/or the Sage Acres HOA, none of which are parties here, but some of which might claim to have been agents, representatives, etc.
>
> With my changes made, I will obtain all signatures, although this will not be possible before the end of this week.

> Please let me know if you have any questions in response to this, thank you.
>
> Andrew

See Davis Opposition Dec. at Exs. I, J, R000553-561. Respondents' reviewed the Appellants' proposed changes to the settlement agreement, and agreed with some of them, but did not agree to others (including Appellants' revisions to the scope of the Release language). *See* Davis Opposition Dec. at Ex. K, 000562.

Likewise, the handwritten meeting minutes from Respondents' December 22, 2014 executive session do not support Appellants' position that the Mediation Terms Sheet is enforceable. That document reads, in relevant part, that the Respondents "accept[ed] the settlement offer *presented by Judge McKee during mediation*[.]" R000493 (emphasis added). By that, Respondents meant that they were accepting settlement of the matter pursuant to the terms they had discussed with Judge McKee, including—as they understood it—that the Appellants would negotiate and execute a release of all claims against Respondents and their related entities and agents. Argyle Aff. at ¶ 13, R000517. The meeting minutes do *not* represent an acceptance of Judge McKee's Mediation Terms Sheet as a final and enforceable settlement agreement containing all necessary and material terms of a potential settlement. *Id.*

Notably, Appellants also appear to continue to rely on language in the "Authorization" they executed in preparation for the mediation to allow representatives from their ranks to appear and bind them to any settlement that was reached. Appellants' Brief filed on January 27, 2016, in Docket No. 43295-2015 ("Appellants' First Brief"), p. 7; Appellants' MSJ Memo, Ex. B, R000451. While a copy of the so-called Authorization was sent to Respondents' counsel,

Respondents' counsel never "consent[ed]" to that document, as Appellants' claim. Davis Opposition Dec. at ¶ 9, R000523. Rather, Respondents' counsel merely stated that she had no *objection* to the form. *Id.*

Appellants further claim that "the scope and effect of the Unconditional Settlement Agreement [proposed by Respondents' counsel was] far beyond the settlement authority granted to any of the mediation representatives or Appellant's attorney . . . ." Appellants' First Brief, p. 9. To the extent Appellants' intended to rely on their so-called "Authorization" to support these assertions, the language in the Authorization itself contradicts this assertion and indicates a much broader agency relationship. Appellants' MSJ Memo, Ex. B, R000451 (granting authority over "my claims pending in the appeal . . . with full and final settlement authority over *all* of my claims herein"; over "the limitation or termination of my interests as a party to these proceedings"; over "my interest to the property I own in the Sage Acres subdivision." Moreover, Appellants' counsel's correspondence indicates a broader agency arrangement as to the so-called Authorization. Davis Opposition Dec. at Ex. L, R000564 (e-mail from Appellants' counsel indicating purpose of Authorization was "to select two or three of [the Appellants] *as fully-authorized, decision-making representatives for purposes of mediation.*").

In all, the record contains no factual support for overturning the District Court's Memorandum Decision on appeal, as the District Court had before it substantial evidence that the Mediation Terms Sheet was never intended to be the parties' final, binding settlement agreement.

D. The District Court's Attorney Fee Award

Appellants' litigation conduct in challenging Respondents' request for attorney fees and costs before the District Court provides further evidence of the frivolity with which this appeal has been pursued. Following the District Court's decision on summary judgment, in compliance with Idaho Rule of Civil Procedure 54(d)(5) and (6), Respondents filed and served on April 17, 2015, their Motion for Attorneys' Fees and Costs, Memorandum of Attorneys' Fees and Costs ("Respondents' F&C Motion"), and the Davis F&C Dec. LR000008-000142. These documents were filed three days after the Court entered the Judgment on April 14, 2015. R000603.

Rule 54(d)(6) clearly provides:

> Any party may object to the claimed costs of another party set forth in a memorandum of costs by filing and serving on adverse parties a motion to disallow part or all of such costs within fourteen (14) days of service of the memorandum of cost. Such motion shall not stay execution on the judgment, exclusive of costs, and shall be heard and determined by the court as other motions under these rules. Failure to timely object to the items in the memorandum of costs shall constitute a waiver of all objections to the costs claimed.

I.R.C.P. 54(d)(6) (emphasis added). The Idaho Supreme Court has recognized: "The rule clearly provides that the failure to file a timely objection to costs and fees claimed in the memorandum of costs constitutes a waiver of objections to the costs claimed." *Allstate Ins. Co. v. Mocaby*, 133 Idaho 593, 600, 990 P.2d 1204, 1211 (1999).[5] However, Appellants failed to file the requisite motion to disallow fees and costs by May 1, 2015—14 days following Respondents' filings—

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[5] Per Rule 54(e)(5), "[a]ttorney fees, when allowable by statute or contract, shall be deemed as costs in an action and processed in the same manner as costs and included in the memorandum of costs."

and instead surpassed that deadline by more than *two months*, filing and serving their opposition on July 7, 2015 ("Appellants' F&C Opposition"). LR000146-151.[6]

Despite Appellants' severe delinquency in filing a motion to disallow or noticing a hearing, in early June 2015, the District Court *sua sponte* requested that a hearing be set. Per the District Court's request, Respondents' noticed their Motion for hearing on July 13, 2015. LR000170-000171. While Rule 54(d)(6) plainly required the District Court to deem any objection to Respondents' F&C Motion conclusively waived, the District Court generously considered Appellants' F&C Opposition and allowed Respondents' to present argument at the hearing.

As had become par for the course, Appellants' F&C Opposition again wholly failed to set forth any specific factual or legal support for the substantive challenges they raised in their Notice. Instead, Appellants only vaguely referenced a "four-inch thick volume of Objections that were presented to the LID Board and which are also on file with this Court." LR000148. This was the first time Appellants had referenced any such volume in briefing or argument to the District Court, and Appellants provided little further explanation of what specific factual support it contained, how its contents justified any of Appellants' specific issues on appeal, or how it was properly introduced into the record before this Court. *Id.* Indeed, no affidavit testimony or

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6 Notably, Rule 54(d)(6) does not measure timeliness with respect to a hearing date. Instead, timeliness is measured exclusively by the filing date of the memorandum of costs. Rule 54(d)(6) ("within fourteen (14) days of service of the memorandum of costs"). Further, Rule 54(d)(5) does not contemplate a hearing on fees and costs or require a party requesting fees and costs to notice a hearing. Instead, that obligation lies with the party filing a motion to disallow under Rule 54(d)(6), which provides that such motion "shall be heard and determined by the court as other motions under these rules."

documentary evidence was submitted in support of Appellants' F&C Opposition, just as none had been submitted in response to Respondents' MSJ.

Besides the vague, passing reference to the agency record, Appellants' F&C Opposition raised only two arguments in opposition to an award of fees. First, they argued that an award of fees is precluded by Idaho Code § 50-1718, which sets forth the manner in which a person may appeal the confirmation of an assessment roll but which does not contain a specific provision for attorney fees. LR000147. Appellants also made a policy argument that an award of fees would have a "chilling effect" on future LID appeals. LR000149.

Following oral argument, the District Court issued a Memorandum Decision and Order dated August 14, 2015, awarding Respondents costs and attorney fees under Idaho Code §§ 12-117(1) and 12-121. 11/14/15 Memorandum Decision and Order, LR000173-178. After noting that both Sections 12-117(1) and 12-121 provide proper bases for a fee award in a case involving a political subdivision, the District Court found that Idaho Code § 50-1718 does not preclude a fee award in an LID appeal. The court found:

> The statute provides that where an assessment is confirmed by the district court on appeal, "the fees of the clerk of the municipality for copies of the record shall be taxed against the appellant with other costs." I.C. § 50-1718. Appellants assert that because the statute is designated as the "exclusive remedy" for such an appeal, and because the statute contains a provision regarding costs but not attorney fees, an award of attorney fees is not available in connection with an appeal brought pursuant to I.C. § 50-1718. The Court disagrees. Although I.C. § 50-1718 itself contains no provision regarding attorney fees, the statute does not specifically exclude an award of attorney fees. Idaho Code sections 12-117(1) and 12-121 both provide a basis for an award of attorney fees in matters where a political subdivision is a party, and the Court finds no conflict between these statutes and I.C. § 50-1718.

LR000175.

As to the factual basis for an award of fees, the District Court specifically noted the many procedural and evidentiary flaws in Appellants' appeal, including: (1) their failure to engage in any meaningful discovery; (2) their production of an expert report that contained no affirmative expert opinions; and (3) their complete failure to make any substantive argument or produce any record evidence in support of the issues raised in their Notice, despite being given multiple opportunities to do so. LR000175-176. Ultimately, the court concluded:

> Although Appellants have made reference to certain items in the agency record, those documents were not admitted as exhibits for the Court's consideration, and Appellants provided no further evidence, by affidavit or otherwise, to support their claims. For these reasons, the Court is left with the abiding belief that the matter was pursued unreasonably and without foundation. The Court also finds that Appellants acted without a reasonable basis in fact or law by continuing to maintain the appeal while substantially failing to engage in discovery or to provide any evidence to support the validity of their challenges.
>
> Appellants have asserted that an award of attorney fees in this matter would have a chilling effect on future appellants who wish to bring challenges to assessments. However, as the purpose of I.C. § 12-121 is to deter frivolous litigation, and as the mandatory fee provision in I.C. § 12-117(1) applies equally to political subdivisions and to property owners such as Appellants where the nonprevailing party has acted without a reasonable basis in fact or law, the Court concludes that an award of attorney fees to Respondents is appropriate in this matter.

LR000176.

Following the entry of a Judgment for Attorneys' Fees and Costs on August 25, 2015 (LR000179-181), Appellants timely appealed to this Court. LR000182.

II.

ATTORNEY FEES ON APPEAL

Respondents respectfully request an award of attorney fees on appeal pursuant to Idaho Code § 12-117 on the basis that—like the appeal to the District Court—this appeal was pursued without reasonable basis in fact or law. Section 12-117(1) provides:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

The basis for this request will be fully explained below. Briefly, however, as to the appeal from the denial of Appellants' MSJ, Appellants' first issue on appeal—that the District Court was required to make a finding that the Mediation Terms Sheet was ambiguous—fundamentally misconstrues Idaho's parol evidence rule and fails to raise any applicable challenge to the decision of the District Court. Appellants' First Brief, pp. 10-11. Their second issue—that the District Court's decision on Appellants' MSJ was based upon "immaterial and improper hearsay testimony"—was never raised to the District Court, is entirely unsupported by argument and authority on appeal, and is baseless. *Id.* at pp. 12-13.

As to the appeal from the award of attorney fees, Appellants' first issue—that the District Court erred in awarding fees because the appeal is not a "civil action"—was also waived at the District Court level and is legally baseless in light of the plain language of Idaho Code §§ 12-117(1) and 50-1718. *Id.* at pp. 6-8. Appellants' second issue on appeal—that they had a reasonable basis in law and fact to appeal the ordinances—is also entirely baseless because

Appellants never produced to Respondents' nor offered into the record before the District Court *any* factual evidence to support the bare allegations in their Notice. *Id.* at pp. 9-11. Moreover, Appellants' bare-minimum litigation tactics forced Respondents to defend against those allegations at significant cost. Even now on appeal to this Court, Appellants rely solely on the bare allegations set forth in their Notice with not a single citation to any supporting record evidence.

In forcing Appellants to respond to this wholly frivolous appeal, Appellants have cost Respondents and their taxpayers additional unnecessary fees and costs. Thus, the Court should award Respondents their reasonable attorney fees on appeal under Idaho Code § 12-117.

III.

ARGUMENT

A. Standard of Review

> "When reviewing an order for summary judgment, this Court applies the same standard of review that was used by the trial court in ruling on the motion for summary judgment." *Vreeken v. Lockwood Eng'g, B.V.,* 148 Idaho 89, 101, 218 P.3d 1150, 1162 (2009). Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). We "construe all disputed facts, and draw all reasonable inferences from the record, in favor of the non-moving party." *Nava v. Rivas–Del Toro,* 151 Idaho 853, 857, 264 P.3d 960, 964 (2011).

Quemada v. Arizmendez, 153 Idaho 609, 612-13, 288 P.3d 826, 829-30 (2012). An award of attorney fees is reviewable for abuse of discretion—specifically, "whether the court perceived the issue as one of discretion, acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it, and reached its decision

by an exercise of reason." *Grease Spot, Inc. v. Harnes*, 148 Idaho 582, 588, 226 P.3d 524, 530 (2010) (quoting *Read v. Harvey,* 147 Idaho 364, 369, 209 P.3d 661, 666 (2009)).

Of upmost importance in this case: "This Court will review those issues raised below, but the Court declines to address issues raised for the first time on appeal." *Neighbors for a Healthy Gold Fork v. Valley Cty.*, 145 Idaho 121, 131, 176 P.3d 126, 136 (2007). Further:

> Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court. *Inama v. Boise County ex rel. Bd. of Comm'rs,* 138 Idaho 324, 330, 63 P.3d 450, 456 (2003) (refusing to address a constitutional takings issue when the issue was not supported by legal authority and was only mentioned in passing).
>
> Where an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court. *Randall v. Ganz,* 96 Idaho 785, 788, 537 P.2d 65, 68 (1975). A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. *Michael v. Zehm,* 74 Idaho 442, 445, 263 P.2d 990, 993 (1953). This Court will not search the record on appeal for error. *Suits v. Idaho Bd. of Prof'l Discipline,* 138 Idaho 397, 400, 64 P.3d 323, 326 (2003). Consequently, to the extent that an assignment of error is not argued and supported in compliance with the I.A.R., it is deemed to be waived. *Suitts v. Nix,* 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

Bach v. Bagley, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010).

B. The District Court Correctly Examined and Relied Upon Extrinsic Evidence in Declining to Enforce the Mediation Terms Sheet on Summary Judgment.

In their first of two issues raised on appeal from the District Court's summary judgment denial, Appellants make the parol evidence rule-based argument that the "District Court erred in considering evidence of the parties' intentions concerning settlement without first making a determination that the Mediation Terms Sheet was ambiguous as a matter of law." Appellants'

First Brief, p. 10. However, Appellants' argument fundamentally misconstrues Idaho's parol evidence rule, which only applies where "the integrated character of the writing is established." *Valley Bank v. Christensen*, 119 Idaho 496, 498, 808 P.2d 415, 417 (1991). Because Appellants failed to establish that the Mediation Terms Sheet was a complete, integrated writing, the District Court correctly examined and relied upon Respondents' substantial extrinsic evidence that the Mediation Terms Sheet lacked an essential release of Appellants' claims and was accordingly unenforceable on summary judgment.

1. The District Court Was Not Required to Make a Finding that the Mediation Terms Sheet Was Ambiguous.

This Court's review is restricted to the narrow issue raised and argued by Appellants, which only asserts that the District Court was required to make a preliminary finding that the Mediation Terms Sheet was ambiguous per the parol evidence rule before considering extrinsic evidence of the parties' intent. *See Bach*, 148 Idaho at 790, 229 P.3d at 1152 ("[T]o the extent that an assignment of error is not argued and supported in compliance with the I.A.R. it is deemed waived."). The parol evidence is inapplicable here, so the District Court was required to make no such finding.

According to this Court, the parol evidence rule provides, "[w]here preliminary negotiations are consummated by written agreement, the writing supersedes all previous understandings and the intent of the parties must be ascertained from the writing." *Valley Bank v. Christensen*, 119 Idaho 496, 498, 808 P.2d 415, 417 (1991) (quoting *Nysingh v. Warren*, 94 Idaho 384, 385, 488 P.2d 355, 356 (1971)). "If the written agreement is *complete upon its face* and unambiguous, no fraud or mistake being alleged, extrinsic evidence of prior or

contemporaneous negotiations or conversations is not admissible to contradict, vary, alter, add to or detract from the terms of the written contract." *Id.* (emphasis added). "This rule, however, applies '*only when the integrated character of the writing is established.* Whether a particular subject of negotiations is embodied in the writing depends on the intent of the parties, revealed by their conduct and language, and by the surrounding circumstances. [The] [m]ere existence of a document does not establish integration.'" *Id.* (emphasis added). The District Court expressly acknowledged these principles, quoting from *Nysingh*, and correctly determined that it must examine extrinsic evidence of intent to determine whether the Mediation Terms Sheet was integrated. Memorandum Decision, pp. 5, R000599.

Here, Respondents argued below—and the District Court agreed in its Memorandum Decision—that the Mediation Terms Sheet was *not* an integrated writing because it did not include an integration clause and, more importantly, it did not contain a full release of Appellants' claims, which was an essential term of the mediation negotiations. Memorandum Decision, pp. 4-6, R000598-600. Thus, the District Court correctly considered the substantial extrinsic evidence submitted by Respondents demonstrating their intent that any settlement agreement would contain a full release. *Id.* at 5-6, R000599-600. In the absence of this essential term, the District Court refused to find that there was a sufficient meeting of the minds to enforce the Mediation Terms Sheet on summary judgment. *Id.* at 6, R000600. *See Lawrence v. Hutchinson*, 146 Idaho 892, 898, 204 P.3d 532, 538 (Ct. App. 2009) ("There must be a meeting of the minds on the essential terms of the agreement.")

In this appeal, Appellants completely fail to raise any challenge to the District Court's conclusion regarding the incomplete, non-integrated nature of the Mediation Terms Sheet. Appellants' First Brief, pp. 10-13. Any such challenge has accordingly been waived. *See Bach*, 148 Idaho at 790, 229 P.3d at 1152. Without attacking this preliminary finding, Appellant has no reasonable basis in Idaho law to raise the parole evidence rule at all. *Valley Bank*, 119 Idaho at 498, 808 P.2d at 417 (The parole evidence rule applies "only when the integrated character of the writing is established."). Indeed, this is a blatant misapplication of a fundamental tenet of Idaho law with no argument for its extension to the case at hand, requiring a further award of attorney fees and costs to Respondents on appeal under Idaho Code § 12-117. Importantly, Appellants cannot salvage this issue in their reply brief, as "this Court will not consider arguments raised for the first time in the appellant's reply brief." *Suitts*, 141 Idaho at 708, 117 P.3d at 122.

2. The District Court Correctly Concluded that the Mediation Terms Sheet was Not Enforceable on Summary Judgment.

Even if Appellants *had* raised an applicable challenge, Respondents' raised substantial extrinsic evidence and legal argument below supporting the District Court's conclusions that the Mediation Terms Sheet was not integrated, that it lacked an essential release of Appellants' claims, and that there was accordingly no meeting of the minds. Thus, the District Court correctly denied Appellants' MSJ and, according to Appellants' wishes, granted Respondents' MSJ.

Idaho law on the enforceability of settlement agreements is well-established: settlement agreements must comply with the same requirements of an enforceable contract. *See Lawrence*, 146 Idaho at 898, 204 P.3d at 538. "Formation of a valid contract requires that there be a

meeting of the minds as evidenced by a manifestation of mutual intent to contract." *Id.* (citing *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 238, 159 P.3d 870 (2007)). Moreover, the contract must be complete, definite, and certain in all of its material terms. *Id.* (citations omitted).

Under Idaho precedent, a release is typically a "material term" to a settlement agreement, and an inability to agree on a release reflects factual disputes as to whether there was a sufficient "meeting of the minds" to have an enforceable agreement. *See, e.g., Lawrence*, 144 Idaho at 900, 204 P.3d at 540 (trial court properly declined to enforce settlement agreement where parties contemplated a formal release but those terms were never resolved); *Kaiser v. Trace, Inc.*, No. 1:13-CV-00010-EJL, 2014 WL 1745419, at *3 (D. Idaho May 1, 2014) (citing *Lawrence* and denying motion to enforce purported settlement agreement because the parties were unable to finalize a release); *see also Bontigao v. Villanova University*, 786 F. Supp. 513, 515 (E.D. Pa. 1992) (release was an "essential term" of settlement agreement and as parties were unable to agree on a release, motion to enforce settlement agreement was denied).

Lawrence is particularly relevant here and should control this Court's decision. There, the plaintiff—a disgruntled client—sued his former lawyers, including defendant Hutchinson, for malpractice and alleged that Hutchinson failed to name the proper defendant in an underlying personal injury case. 146 Idaho at 895. Hutchinson's attorney negotiated with the plaintiff's attorney to settle the malpractice case. *Id.* The parties discussed a "standard release" as part of the settlement, and subsequently agreed to settle the malpractice claim for $37,500. *Id.*

Later, Hutchinson learned that the plaintiff had assigned his claim to a medical provider, possibly exposing Hutchinson to additional liability. *Id.* at 896. The parties were unable to agree on the language and scope of a release, and more specifically whether the release would include confidentiality and indemnity provisions. *Id.* at 895-896. The parties exchanged draft settlement agreements, including various revisions and comments regarding the language and scope of the release. *Id.* at 899. However, the parties were ultimately unable to agree, and the negotiations broke down. *Id.* at 896-897. The plaintiff then brought a motion for summary judgment seeking to enforce the purported settlement agreement. *Id.* Hutchinson brought a cross-motion for summary judgment seeking a ruling that there was no enforceable settlement agreement. *Id.*

The trial court agreed with Hutchinson and ruled that there was no enforceable settlement agreement. *Id.* at 897. Specifically, the trial court held that the release—including whether there was agreement on the confidentiality and indemnity provisions—was a material term to the settlement agreement, and because those issues were not agreed upon, there was no binding settlement agreement. *Id.* The Court granted Hutchinson's motion for summary judgment and dismissed plaintiff's action seeking enforcement of the purported settlement agreement. *Id.* The plaintiff appealed. *Id.*

The Court of Appeals agreed with the trial court and held that the release was a material term to any settlement agreement. The Court reasoned that the parties' inability to agree on the scope, language, and provisions of the release meant that no enforceable settlement agreement existed. *Id.* at 898-900. The Court ruled that to be enforceable under Idaho law, a settlement

agreement must contain all essential and material terms. *Id.* at 898. As evidence that the plaintiff was aware that the release was a material term of the agreement, the Court relied on the fact that the plaintiff only moved to enforce the purported settlement agreement after he was faced with a pending motion for summary judgment, and that the plaintiff had participated in extensive exchanges of draft language and commentary regarding the scope of the release. *Id.* This evidence indicated that neither party had conducted themselves as if there had been a "meeting of the minds" on the material terms of settlement. *Id.*

The Court also rejected the plaintiff's reliance on *Suitts v. First Sec. Bank of Idaho, N.A.*, 125 Idaho 27, 867 P.2d 260 (Ct. App. 1993), and *Kohring v. Robertson,* 137 Idaho 94, 44 P.3d 1149 (2002). In *Suitts*, the dispute over the language of the settlement agreement was not over a material term, such as a release, but rather over the legal consequences of the settlement agreement. *See Lawrence*, 125 Idaho at 899. In *Kohring*, unlike the facts at issue, all terms had been presented in a telephone conversation, and both parties agreed on the record before the court that there was no dispute over the terms. *See Lawrence*, 125 Idaho at 899. Accordingly, the *Lawrence* court declined to follow those cases as distinguishable from a case where there was a dispute over the scope and terms of a release. *Id.*

Here, like in *Lawrence*, there was no meeting of the minds as to the scope and terms of a settlement agreement because there was substantial evidence that a release was a material term. Thus, the District Court correctly found that, to determine whether the Mediation Terms Sheet was integrated and ultimately whether there was a meeting of the minds, it "must examine 'the intent of the parties, revealed by their conduct and language, and by the surrounding

circumstances.'" Memorandum Decision, p. 5, R000559 (citing *Nysingh v. Warren*, 94 Idaho 384, 385, 488 P.2d 355, 356 (1971)).

As the District Court noted, the Respondents considered the Appellants' release of all claims to be a necessary and material term to any potential settlement agreement. Argyle Aff. at ¶ 8, 000515. This is not at all surprising, given that Appellants included factual allegations in their appeal regarding the alleged "unworkmanlike" manner of the construction of the water system and alleged damage to Appellants' real property. *Id.* at ¶ 5, R000514. Regardless, Respondents believed that the substantive terms of a potential settlement, as conveyed by Judge McKee, included an agreement from Appellants to execute a full release of all claims in any way related to the allegations or claims made in their Notice of Appeal, releasing Respondents, including a release of all claims that could be brought against them for the acts of their agents. *Id.* at ¶ 6, R000515. It was only pursuant to the terms as presented by Judge McKee that Respondents would agree to settle the case. *Id.* at ¶ 8. Moreover, Respondents considered each of the terms, including the release, to be material to a settlement agreement and that all of them were necessary for a full and final settlement agreement to be reached. *Id.* at ¶¶ 7-8.

Also like in *Lawrence*, the fact that both parties engaged in extensive negotiations over the language and scope of the release in the settlement agreement indicates that there was never a meeting of the minds on a settlement agreement. *See Lawrence*, 125 Idaho at 899. Indeed, citing *Lawrence*, the District Court expressly noted that "participation in draft revisions of a proposed written settlement agreement and release may indicate the lack of a meeting of the

minds with respect to all material terms of a settlement." Memorandum Decision, p. 6 (citing *Lawrence*, 146 Idaho at 900, 204 P.3d at 540), R000559.

At no point prior to their so-called "Motion to Dismiss" and subsequent MSJ did Appellants conduct themselves as though the Mediation Terms Sheet represented a full and final settlement agreement. *Id.* at 899. Instead, Appellants exchanged drafts of a settlement agreement and negotiated regarding the scope and language of the release. *Compare* Davis Opposition Dec. at Exs. I, J, R000553-561; *with Lawrence*, 125 Idaho at 900. Indeed, Appellants *only* treated the Mediation Terms Sheet as if it were an enforceable settlement agreement after Respondents insisted on moving forward with their summary judgment motion. *See Lawrence*, 125 Idaho at 900. Thus, just as in *Lawrence*, because of the parties' inability to agree on the scope and language of a release, there was no "meeting of the minds" on a material term of the agreement, and the Mediation Terms Sheet is an unenforceable settlement agreement. *See id.*

Again, the District Court correctly considered all of this significant evidence because Appellants never established—or even specifically argued below—that the Mediation Terms Sheet was an integrated document. Appellants simply argued that the fact that the parties signed the Mediation Terms Sheet was dispositive. *See* Appellants' Memorandum in Support of Motion for Summary Judgment ("Appellants' MSJ Memo"), p. 10, R000504. It is not. Under Idaho law, in the absence of an "integration" (or "merger") clause or an express finding that the parties intended total integration, parol evidence of additional contract terms is admissible. *See e.g. Valley Bank v. Christensen*, 119 Idaho 496, 498, 808 P.2d 415, 417 (1991) ("The mere existence

of a written document, however, does not establish integration."); *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 230, 297 P.3d 222 (2011) (citing *Valley Bank*).

Here, the Mediation Terms Sheet does not contain an integration or merger clause. Davis Opposition Dec., Ex. A, R000525. Moreover, the document itself indicates that the Appellants were to have "30 days from *date of close on this agreement*" to make required payments. *Id.* (emphasis added). Coupled with the handwritten, slapdash nature of the Mediation Terms Sheet, the District Court would have had no basis to find that the face of the document evidenced an integrated agreement. Regardless, as discussed above, there was significant extrinsic evidence presented to the District Court that the parties intended additional terms, including a full release of Appellants' claims, as part of their eventual settlement agreement. For all of these reasons, the Mediation Terms Sheet is *not* a fully integrated document, and the District Court correctly proceeded to examine and rely upon extrinsic evidence to conclude that the Mediation Terms Sheet was not enforceable on summary judgment.

In their Statement of Facts—but, again, without any argument or authority (*see Bach*, 148 Idaho at 790, 229 P.3d at 1152)—Appellants appear to take issue with the Respondents' demand that any settlement agreement include a release of all potential and future claims (including those against Respondents' agents or related entities). *See* Appellants' First Brief, pp. 6-9. Appellants *appear* to suggest that releases should govern *only* the narrow claims specifically identified in the pleadings. Appellants' view reveals a fundamental misunderstanding of how lawsuits and claims are typically settled and ignores that it is common-practice to settle all potential or future claims, including claims that could pass through to the settling parties through their agents or

related entities. Regardless, Appellants' allegations in their Notice were so broad and all-encompassing, a similarly broad release was *necessary* to make any settlement meaningful.

To demonstrate this principle, assume an employee sues his employer for work-related injuries. Assume further that the employer terminates the employee for legitimate business reasons having nothing to do with the workers' compensation lawsuit. Both parties then wish to settle the workers' compensation case, but the employer cannot reasonably risk that the employee will later sue for "wrongful termination" or some other legal theory related to the same set of facts. The employer must then negotiate a release of all future and potential claims to adequately protect itself. This is a common practice in the law. *See e.g. Robert Comstock, LLC v. Keybank Nat. Ass'n*, 142 Idaho 568, 572, 130 P.3d 1106, 1110 (2006).

Under Appellants' reading, in any litigation, only the *asserted* claims can ever be released. Thus, applying Appellants' theory to the hypothetical above, an employer must settle the workers' compensation case and then hope and pray that it is not later sued on a wrongful termination claim *related to the same incident.* That is not the law in Idaho, and to hold otherwise would place a huge burden on Idaho litigants and the Idaho courts. *See Comstock*, 142 Idaho at 572 (supporting the enforceability of broad releases, including releases of potential and future claims).

A similar reasoning supports why releasors often settle on behalf of their agents or related entities. Assume the employer in the hypothetical above has an indemnity agreement with a third-party responsible for causing the employee's work-related injury. What good does it do to settle the employee's worker's compensation claim if the employee may then later sue the third-

party? That third-party would then simply sue the employer pursuant to the indemnity agreement, and the employer is then at risk of paying for the same lawsuit *twice*. Again, it is common practice to release such claims, and Appellants' view to the contrary is inconsistent with Idaho law and common litigation practice. Indeed, Appellants' allegations in their Notice were so broad and all-encompassing, a similarly broad release was *necessary* to make any settlement meaningful.

In all, even if Appellants *had* raised an applicable challenge to the District Court's analysis in this appeal, Respondents' raised substantial extrinsic evidence and legal argument below supporting the District Court's conclusions that the Mediation Terms Sheet was not integrated, that it lacked an essential release of Appellants' claims, and that there was accordingly no meeting of the minds. Thus, the District Court correctly denied Appellants' MSJ and—according to Appellants' direction in the Notice of Non-Opposition and at the summary judgment hearing—granted Respondents' MSJ.

C. The District Court's Decision Is Not Based on Immaterial or Improper Testimony.

Appellants' second of two issues raised on appeal—that the District Court relied upon "immaterial and improper hearsay testimony" in denying their MSJ—is even more baseless than their first, as it was never raised to the District Court below and is not now supported by any cogent argument or applicable authority that would allow any meaningful response by Respondents or legitimate review by this Court. Regardless, the District Court did not commit any evidentiary error by considering the affidavit testimony of Respondents' counsel, Lynnette M. Davis, and Respondents' representative, Theodore E. Argyle.

1. Appellants Failed to Raise *Any* Evidentiary Objection at the District Court Level and Now Fail to Support Their Vague Issue on Appeal with Cogent Argument and Authority.

The appellate standards discussed above bear repeating here. "This Court will review those issues raised below, but the Court declines to address issues raised for the first time on appeal." *Neighbors for a Healthy Gold Fork*, 145 Idaho at 131, 176 P.3d at 136. Further:

> Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court. *Inama v. Boise County ex rel. Bd. of Comm'rs,* 138 Idaho 324, 330, 63 P.3d 450, 456 (2003) (refusing to address a constitutional takings issue when the issue was not supported by legal authority and was only mentioned in passing).
>
> Where an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court. *Randall v. Ganz,* 96 Idaho 785, 788, 537 P.2d 65, 68 (1975). A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. *Michael v. Zehm,* 74 Idaho 442, 445, 263 P.2d 990, 993 (1953). This Court will not search the record on appeal for error. *Suits v. Idaho Bd. of Prof'l Discipline,* 138 Idaho 397, 400, 64 P.3d 323, 326 (2003). Consequently, to the extent that an assignment of error is not argued and supported in compliance with the I.A.R., it is deemed to be waived. *Suitts v. Nix,* 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

Bach, 148 Idaho at 790, 229 P.3d at 1152.

Here, neither Appellants' MSJ Memo (R000429-441) nor their argument at the MSJ Hearing (3/12/15 Tr., 77-81)[7] contains *any* objection to the evidence submitted in support of Respondents' MSJ Opposition—much less the *specific* evidentiary objections to the testimony of Ms. Davis and Mr. Argyle required to preserve an issue for appeal. *See State v. Estes*, 148 Idaho

[7] Appellants did not file a reply brief in further support of their MSJ.

345, 346, 223 P.3d 287, 288 (Ct. App. 2009) (An appellate court "will not address an evidentiary issue not preserved for appeal by a timely and *specific* trial objection." (emphasis added)). Per this Court's clear precedent, any such issues are now waived. Indeed, Appellants' blatant attempt to raise those issues now—with absolutely no mention of them below and in the face of this Court's clear mandates—is yet another instance of conduct supporting an award of attorney fees and costs to Respondents' on appeal under Idaho Code § 12-117.

Additionally, the evidentiary arguments raised by Appellants are far too vague and incomprehensible to deserve this Court's consideration, and they make any legitimate response from Respondents impossible. *Bach*, 148 Idaho at 790, 229 P.3d at 1152. First, Appellants' argument that "the absence of any ambiguity determination renders the Respondent's [sic] opposing evidence entirely immaterial as a matter of law" is simply a rehashing of their first frivolous issue on appeal, which is fully addressed above. As for Appellants' remaining arguments, they fail to specify any specific testimony in the affidavits of Ms. Davis and Mr. Argyle that might be problematic, instead making sweeping generalizations that their testimony amounts to "bare allegations and denials." Appellants' MSJ Memo, p. 12.

Appellants further assert that "there is a substantial question as to whether such testimony by counsel concerning a client's mental state or beliefs is admissible at all under the hearsay rule, as it appears to not fall within any exception to that rule." *Id.* at p. 13. Arguing that there is a "substantial question" whether something is admissible is not even an affirmative argument, and Appellants make no further effort to characterize any specific testimony by Ms. Davis and Mr. Argyle as hearsay or to cite any supporting rule or case law. Again, Appellants cannot remedy

these gross deficiencies in their reply brief, as no hearsay objection was raised to the District Court and "this Court will not consider arguments raised for the first time in the appellant's reply brief." *Suitts*, 141 Idaho at 708, 117 P.3d at 122.

2. The District Court Correctly Considered the Testimony of Ms. Davis and Mr. Argyle.

To the extent that it is even possible or necessary to respond to Appellants' vague and invalid arguments in this Appeal, Respondents will attempt to do so for the sake of completeness. Appellants' argument regarding the "materiality" of Ms. Davis' and Mr. Argyle's testimony is fully addressed above. In short, the District Court correctly considered extrinsic evidence of the parties' intent at the mediation and subsequent settlement negotiations, including "the intent of the parties, revealed by their conduct and language, and by the surrounding circumstances." *Nysingh v. Warren*, 94 Idaho 384, 385, 488 P.2d 355, 356 (1971).

As to Appellants' "hearsay" arguments, Ms. Davis and Mr. Argyle were physically present at and handled the mediation on behalf of Respondents, and Ms. Davis personally handled the negotiations regarding a release of Appellants' claims following the mediation. Thus, Ms. Davis and Mr. Argyle certainly had personal knowledge of the matters to which they testified and were, in fact, best suited to offer such testimony. Further, any hearsay their affidavits might contain is subject to multiple exceptions to exclusion from evidence under Idaho Rule of Evidence 803.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." IRE 801(c). Here, Ms. Davis' and Mr. Argyle's affidavits primarily recount the proceedings of the mediation

on December 22, 2014, including the terms they discussed with mediator D. Duff McKee throughout the day. *See generally* Argyle Aff. and Davis Opposition Dec., R000513-523. As they were each personally involved in those discussions, their testimony about what they communicated to the mediator on behalf of Respondents is not hearsay. The affidavits further explain the Respondents' intent at the mediation that any settlement would contain a full release of Appellants' claims. To the extent there is any identifiable hearsay in such testimony, it is based on the present sense impressions and/or existing mental conditions of Respondents expressed to Ms. Davis and Mr. Argyle during the mediation. IRE 803(1), (3). Finally, Ms. Davis's testimony also simply recounts the course of negotiations with Appellants' counsel following the mediation—again, conduct she personally engaged in. This testimony, too, contains no inadmissible hearsay.

In all, even if Appellants had raised a hearsay objection to the District Court and adequately raised the issue in this appeal, it would still be baseless. In forcing Appellants to respond to this frivolous issue—and this frivolous appeal as a whole—Appellants have cost Respondents and their taxpayers additional unnecessary fees and costs. Thus, the Court should not only affirm the District Court's Memorandum Decision below; it should also award Respondents their reasonable attorney fees and costs on appeal under Idaho Code § 12-117.

D. The District Court Correctly Applied Idaho law in Awarding Respondents' Attorney Fees.

In their first issue on appeal from the District Court's award of attorney fees to Respondents, Appellants raise yet another brand new legal argument to this Court, arguing that the District Court erred in awarding fees because their appeal is not a "civil action" under Idaho

Rules of Civil Procedure 3(a) and 54. But this argument has been waived and, regardless has no bearing on the District Court's ability to award fees under Idaho Code § 12-117(1), which plainly provides for a fee award in an appeal involving a public agency or political subdivision. Appellants further ask this Court to gut the clear basis for a fee award in Section 12-117(1) in all local improvement district appeals based on a strained and untenable reading of Idaho Code § 50-1718. As the District Court found below, there is no conflict between Sections 50-1718 and 12-117(1) that would allow the District Court or this Court to preclude a fee award under Section 12-117(1). Indeed, Appellants' baseless arguments provide further support for a fee award under Section 12-117(1) in this appeal.

1. Appellants Waived any Argument that Their Appeal Is Not a "Civil Action" under Idaho Rules of Civil Procedure 3(a) and 54.

Appellants argue that an award of fees under Idaho Code § 12-121 is inappropriate because Section 12-121 only provides for fees in a "civil action," which Appellants assert does not include the present appeal. There is no need for this Court to address this issue, as Appellants never raised it in briefing or argument to the District Court. *See generally* LR000146-151; 7/13/14 Hearing Transcript. Again, "[t]his Court will review those issues raised below, but the Court declines to address issues raised for the first time on appeal." *Neighbors for a Healthy Gold Fork*, 145 Idaho at 131, 176 P.3d at 136. Accordingly, this issue has been conclusively waived, and its appearance in Appellants' Brief filed on February 19, 2016, in Docket No. 43628-2015 ("Appellants' Second Brief"), provides further grounds for an award of appellate attorney fees by this Court. Appellants' Second Brief, pp. 1, 6-8.

Regardless, Appellants' argument that this appeal is not a "civil action" has no bearing at all on the District Court's ability to award fees under Idaho Code § 12-117(1), which provides:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

Idaho Code § 12-117(1) (emphasis added). Thus, regardless of whether fees are awardable under Idaho Code § 12-121 in an LID appeal, they are plainly awardable "in any proceeding"—specifically "including on appeal"—such as the LID appeal at hand.

2. Idaho Code § 50-1718 Does Not Preclude an Award of Attorney Fees under Idaho Code § 12-117(1).

Appellants further argue on appeal—as they did below—that Idaho Code § 50-1718 precludes an award of attorney fees under Idaho Code § 12-117 on the basis that Section 50-1718 provides the "exclusive remedy" for a party aggrieved by the confirmation of a local improvement district assessment roll. Appellants' Second Brief, p. 7. But as the District Court found below, this is a strained and untenable interpretation.

Section 50-1718 provides an "exclusive" 30-day appeal period for parties aggrieved by the confirmation of an assessment roll, which runs from the date of publication of the confirmation ordinance. The statute provides: "After said thirty (30) day appeal period has run, no one shall have any cause or right of action to contest the legality, formality or regularity of said assessments for any reason whatsoever and, thereafter, said assessments and the liens thereon shall be considered valid and incontestable without limitation." However, nowhere does Section 50-1718 provide an "exclusive" provision for fees and costs. Instead, the statute only

states: "In case the assessment is confirmed, the fees of the clerk of the municipality for copies of the record shall be taxed against the appellant with other costs." Thus, far from foreclosing an award of attorney fees, the statute itself expressly leaves the door open to "other costs" that might be awarded. Notably, per Rule 54(e)(5), "[a]ttorney fees, when allowable by statute or contract, shall be deemed as costs in an action and processed in the same manner as costs and included in the memorandum of costs." (Emphasis added).

Given this non-exclusive language, Section 50-1718 certainly does not displace Idaho Code § 12-117(1), which provides:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

Idaho Code § 12-117(1) (emphasis added). Thus, Idaho Code § 12-117(1) specifically provides for an award of attorneys' fees in favor of a political subdivision in an appeal such as the one at hand.

Idaho courts will apply one statute over another only "to the extent of any necessary repugnancy between them"—where the two statutes are "necessarily inconsistent." *Christensen v. W.*, 92 Idaho 87, 90-91, 437 P.2d 359, 362-63 (1968). And even in the case of an apparent conflict between statutes, courts are required to "harmonize statutes" where reasonably possible. *Id.* Here, because Section 50-1718 does not provide an exclusive provision for fees and costs and, instead, expressly opens the door to "other costs," it does not necessarily conflict with Section 12-117(1) at all. And even if some apparent conflict *did* exist, this Court could easily

harmonize the two statutes and find that they are both applicable to the present appeal, as did the District Court below.

In all, Appellants' argument flies in the face of the plain language of Idaho Code §§ 12-117(1) and 50-1718 and provides further basis for an award of fees in this appeal under Section 12-117(1).

E. The District Court Correctly Found that Appellants Brought and Pursued this Appeal without Reasonable Basis in Fact or Law.

As they did below, Appellants again raise the vague and conclusory assertion that their appeal was legally and factually supported and met the "low threshold" for an appeal under Idaho Code § 50-1718. Appellants' Second Brief, p. 10. However, Appellants again make only passing references to the agency record in support of these assertions with *not a single citation to any record evidence*. Accordingly, their argument should be deemed waived under the principles set forth in *Bach*, 148 Idaho at 790, 229 P.3d at 1152, and Respondents should be awarded fees for being forced to again respond to frivolous argument.

Even if this Court is inclined to analyze the issue, the District Court correctly awarded fees. The decision to award fees for frivolity is subject to the district court's discretion. *Garner v. Povey*, 151 Idaho 462, 467-68, 259 P.3d 608, 613-14 (2011) (citing *Coward v. Hadley*, 150 Idaho 282, 290, 246 P.3d 391, 399 (2010)). Fees are appropriate when the district court "is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation." *Id.* (internal quotation marks omitted). Ultimately, the question comes down to whether a party has presented the Court with *at least* "fairly debatable

issues." *See id.* at 468, 259 P.3d at 614. If a party has not, it is within a district court's discretion to award fees. *Id.*

Here, the District Court acted well within its discretion and expressly found that, following the filing of their Notice, Appellants: (1) failed to engage in any meaningful discovery; (2) produced an expert report that contained no affirmative expert opinions; and (3) completely failed to make any substantive argument or produce any record evidence in support of the issues raised in their Notice, despite being given multiple opportunities to do so. LR000175-176. Appellants continue that trend on appeal to this Court, failing to point to *anything* in the record that would support their claims. As addressed below, the only factual support Appellants *vaguely* reference is a "four-inch thick volume of Objections that were presented to the LID Board and which are also on file with this Court." Appellants' Second Brief, p. 10. Appellants provide no explanation whatsoever of what specific factual support it contains, how its contents justify any of Appellants' specific issues on appeal, or how it was properly introduced into the record before this Court.

Although Appellants were given multiple opportunities to do so, they provided absolutely no substantive briefing, affidavit testimony, or documentary evidence in response to Respondents' MSJ, which attacked each and every one of the challenges raised in Appellants' Notice of Appeal. Appellants' "four-inch thick volume" was not referenced, cited to, or argued then, and it cannot be relied upon now. In essence, Appellants asked the District Court and now this Court to do their work for them—to go fishing in the file for factual support that they have repeatedly failed and refused to provide. The Court need not and should not do so. Indeed,

"[t]his Court will not search the record on appeal for error. *Bach*, 148 Idaho at 790, 229 P.3d at 1152 (citing *Suits,* 138 Idaho at 400, 64 P.3d at 326).

Presumably, Appellants refer to the objections submitted to the Board of the Local Improvement District No. 1101 ("LID Board") prior to this appeal. If so, any such material—even if part of the agency record—is inadmissible and *inconsequential* in the present appeal. As the District Court held in its March 7, 2014 Memorandum Decision and Order—where the Court denied Appellants' motion to augment the record on appeal—this was a *de novo* appeal; thus, the contents of the agency record are "inconsequential." 3/7/14 Memorandum Decision and Order, p. 2, R000115-118. As the Court stated:

> Pursuant to the Idaho Rules of Civil Procedure, the "procedures and standards of review applicable to judicial review of state agency and local government actions shall be as provided by statute." I.R.C.P. 84(a)(1). Idaho Code section 50-1718 sets forth the procedure for appeals from local improvement district assessments. The statute provides that such an appeal "shall be tried . . . as in the case of equitable causes except that no pleading shall be necessary." I.C. § 50-1718. In an action challenging assessments against property, "the district court on appeal sits as a court of equity and hears the matter de novo." *Ward v. Ada County Highway Dist.*, 106 Idaho 889, 893, 684 P.2d 291, 295 (1984); *see also Wood v. City of Lewiston*, 138 Idaho 218, 222, 61 P.3d 575, 579 (2002). When a statute provides that review is *de novo*, "the appeal shall be tried in the district court on any and all issues, on a new record." I.R.C.P. 84(e)(1) (emphasis added [by the Court]). Accordingly, in the case at bar, as the matter will be tried *de novo* on a new record, the Court concludes that augmentation of the agency record is unnecessary.

R000116.

Therefore, because this appeal was to be tried on an entirely new record, Appellants cannot rely upon the agency record alone as factual support for their claims. And regardless, Appellants failed to direct the District Court and fail to direct this Court to any specific

evidence—even in the agency record—that would support their allegations that (1) the ordinances were procedurally flawed; (2) that the design, construction, or performance of the water delivery system were defective; or (3) that the Sage Acres LID residents were not benefited by the improvements. Respondents properly submitted *substantial* affirmative evidence on summary judgment undercutting each of these challenges and demonstrating that the appeal of the Formation Ordinance was time-barred. Appellants failed to provide *any* response.

Even if the District Court or this Court were inclined to go fishing through the agency record for factual support on Appellants' behalf, Appellants further failed to offer a shred of legal argument showing how any such evidence might support a cognizable claim under Idaho's LID Code. In their briefing on appeal, Appellants continue to make the following conclusory claims based exclusively upon unidentified documents allegedly contained in the Agency Record:

> Those Objections lay out not only the clearly flawed and even evasive procedures which led to the formation of the LID itself, but they also outline specific grievances concerning the amount of the assessment, the regularity of the assessment, the uncompensated property damages done to certain Appellants' property in the course of the LID's construction of the water system, the apparent inclusion of attorney's fees owed by the Sage Acres HOA in the assessment, and other concerns that directly impact all of the Appellants as property owner within the LID.

Appellants' Second Brief, p. 10.

However, Appellants still fail to set forth any good faith basis for extension of the statute of limitation covering their challenges to the Formation Ordinance. *See* Respondents' MSJ

Memorandum at pp. 9-13, R000366-370.[8] Further, Appellants have failed to show how their challenges to the Assessment Ordinance fell under any of the legally cognizable bases in Idaho's LID Code. *Id.* at pp. 13-21, R000370-378.[9] Finally, Appellants failed to demonstrate how Appellants Darrin Hendricks, Kim Blough, and Chuck Boyer had legal standing to even raise the challenges in the LID in light of the fact that property records showed they did not own any property within the LID at the time of the appeal. *See id.* at 21-23, R000378-380.[10]

In all, as fully argued and supported in Respondents' MSJ (*see* R000358-381)—and as the District Court found as a matter of law—the challenges raised in Appellants' Notice were statutorily time-barred, legally irrelevant under Idaho's LID Code, and devoid of any evidentiary support. Respondents' MSJ presented full legal argument on Appellants' challenges,

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[8] Under Idaho Code § 50-1727, any ordinance adopted under Idaho's LID Code, including the Formation Ordinance, is subject to a 30-day challenge limitation running from its publication and, upon the expiration of that limitation period, "the validity, legality and regularity of such ordinance . . . shall be conclusively presumed." *See Simmons v. City of Moscow*, 111 Idaho 14, 18, 720 P.2d 197, 201 (1986) ("The trial court correctly concluded that I.C. § 50-1727(1) applied to prevent the property owners from contesting the validity, legality, and regularity of the creation ordinance.") (footnote omitted).

[9] Idaho Code § 50-1714 allows for objections to be made based upon "the regularity of the proceedings in making such assessment, to the correctness of such assessment, to the amount levied on any particular lot or parcel of land, including the benefits accruing thereon and the proper proportionate share of the total cost of the improvements to be borne thereby and to the inclusion of any lot or parcel of land in the proposed district."

[10] Appellants continue to make a general argument on appeal that Idaho's LID Code "broadly" provides standing to any "aggrieved persons," although they do not make any specific argument regarding Hendricks, Blough, and Boyer. Appellants' Second Brief, p. 9. As Respondents' have argued, Idaho courts addressing similar issues hold that a party has standing to sue as a "person aggrieved" only when a decision "operates directly and injuriously upon his personal, pecuniary, or property rights." *See Ashton Urban Renewal Agency v. Ashton Mem., Inc.*, 155 Idaho 309, 311 (2013) (discussing Idaho Code § 63-511(1) and quoting *Application of Fernan Lake Vill.*, 80 Idaho 412, 415, 331 P.2d 278, 279 (1958)). *See* Respondents' MSJ Memorandum at 21-23, R000378-380. Appellants have failed to make any argument or produce any evidence demonstrating that Hendricks, Blough, and Boyer fall within this definition.

accompanied by admissible testimony and documentary evidence, demonstrating as a matter of law that: Sage Acres LID was duly formed by the Formation Ordinance; Appellants' appeal of the Formation Ordinance was time barred; the water delivery system to be funded by the LID was designed and constructed in a cost-effective and workmanlike manner in compliance with all applicable laws and regulations; and the LID assessment roll was duly confirmed by the Assessment Ordinance. Appellants wholly failed to provide any factual or legal support to the contrary and, thus, the District Court was well within its discretion to award Respondents fees under Idaho Code § 12-117(1) on this basis alone.

Indeed, the Court simply has no argument or evidence before it that could create even "fairly debatable issues" regarding any of Appellants' challenges. And Appellants' bare-minimum litigation tactics in this case further reveal that their challenges were baseless from the outset and not brought and pursued in good faith. Idaho courts have upheld fee awards based on similar conduct. In *Rammell v. State*, for example, the Court upheld an award under Idaho Code § 12-117 where the plaintiffs: (1) were given a chance to amend their complaint to state legally cognizable grounds and still failed to assert any new facts; and (2) on summary judgment, one of their claims "was supported by absolutely no evidence." 154 Idaho 669, 677, 302 P.3d 9, 17 (2012). Thus, the Court found that it was within the bounds of the district court's discretion to award fees and reasonable expenses. *Id.*

It was well within the District Court's discretion to award reasonable attorney fees to Respondents and this Court should likewise award them on this appeal. By pursuing an appeal with bare-minimum litigation tactics and without a shred of legal or factual support, Appellants

have unnecessarily cost the taxpayers of Ada County significant attorney fees. Such litigation conduct is quintessentially the type of conduct that can and should be deterred by a fee award. This Court should accordingly affirm the District Court's decision and award fees on appeal under Idaho Code § 12-117(1).

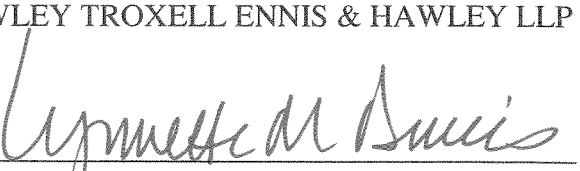
IV.

CONCLUSION

For each of the foregoing reasons, Respondents' respectfully request that this Court affirm the decisions of the District Court and award Appellants' reasonable attorney fees on appeal pursuant to Idaho Code § 12-117(1).

DATED THIS 21st day of March, 2016.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of March, 2016, I caused to be served a true copy of the foregoing RESPONDENTS' BRIEF by the method indicated below, and addressed to each of the following:

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